

# What I would like to ask the AfD

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Maximilian Steinbeis Sa 28 Okt 2017

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Dear Friends of Verfassungsblog,

The AfD has noisily taken seat in the plenary of the newly constituted 19th German *Bundestag*. Her maiden speech in Parliament was yet another lament how unfairly they were treated, how they were victimized and marginalised and mistreated by a political establishment that betrays its own democratic standards and tries to withhold from her what every party represented in the Bundestag is entitled to. As far as the position of the Interim Speaker was concerned, who would have come from the AfD had the Parliament stuck to its decade-old practice instead of altering it at the last minute, there is in fact a lot to be said for that accusation. On the other hand, the fact that the AfD was denied a Deputy Speaker is perfectly in line with the demands of democracy: The candidate they put forward had denied Muslims the right of religious freedom for their creed, and that is a perfectly valid and legitimate reason for each and every M.P. to not pick that man to lead their meetings. There may be a habit of granting each party represented in Parliament a Deputy Speaker, but there is no right of this party to dictate to the majority who that is supposed to be. Let the AfD present a viable candidate. That is entirely on them.

In this respect, the "not-an-inch-to-the-fascists" reflex is easily justified here (and is therefore not a reflex in that particular case). That doesn't change the overall findings, though. I do not want to go into [detail here again](#) about the self-victimization strategy of the far right and the contribution of the non-far-right to its success. But it seems clear to me that we still have no clue how to deal with these people. A party that is constantly clamouring how normal and democratic and legitimate and totally blameless she is and at the same time gives us abundant cause to mistrust this very assertion to the highest degree – that experience is still new to us. We make mistakes. We bumble about, and the AfD ("We will hunt them!", as its leader Alexander Gauland so tellingly said on the election day) derives as much fun and profit from it as they possibly can.

How do we get out of this? Two positions seem to me to be out of the question: one is to seek refuge to the belief that they are all Nazis we shouldn't touch with a flagpole, so the less interaction we have with them the better. That is obviously an instrument both too blunt and too flimsy to be of any use with those people. The other is to simply take their word for it and concede that they are entirely honourable democrats just because they say so.

There is one urgent question I'd like to ask the AfD: could I be expected to accept being in a minority against them?

The minority cedes the power to make collectively binding decisions to the majority. That is what defines democracy. The presupposition of any functioning democracy is, though, that the outvoted do not need to fear that the majority will use that power to come after them in any existential way. Otherwise, they just won't. Call that undemocratic, but no one can reasonably expect them to.

For this reason, a functional democracy indispensably requires procedures and institutions which give the minority the necessary confidence that they can afford ceding power to the majority. Procedures to ensure that the majority always remains a potential minority and vice versa. Fundamental rights to limit their power over the minority to what is justifiable. Strong and independent courts to guard and enforce both. Where all of that is in place, the minority will likely admit defeat with a sigh and say: Congratulations, there you have the arms and the laws and the jails and the bureaucrats, it's all yours for the next couple of years, at your disposal and good luck with it. Where there isn't, the minority will do no such thing, and they were bloody fools if they did. Therefore, any majority, and any party that wants to become one, must for democracy's sake not give the minority a justifiable reason to mistrust their commitment to constitutional procedures and rights.

That seems to me to be the criterion by which the AfD's claim to be an irreproachably democratic party should be judged: whether one can be expected to accept being in a minority against it. That is the yardstick, and not

whether or not they commit to majoritarian rule and the will of the people – of course they do. That sort of question is not so easily scandalised as an attempt at exclusion and discrimination, either. We just ask them to kindly give us some answers. Look, you claimed you want to "take back your country" – reassure us that we don't have to understand this as a claim of ownership including the right to exclusion (or do we?). You gave us a load of reasons to mistrust you, so please clear that up for us. Let's talk this through. We don't trust you, for reasons you've set. Now, give us reasons to trust you. Not to like you, not to be on your side. Just to trust you. For democracy's sake.

## Seven steps on the road to hell

As I write this, the constitutional state in **Spain** is falling apart. The fact that it has not been possible for weeks, months and years to break the spiral of escalation between Barcelona and Madrid, neither at regional nor national nor at European level, is a tragedy from which we will not recover for a long time. Seven steps on the road to hell were described by [JOSÉ LUIS MARTÍ](#) in his chilling summary of the whole drama, two others were not yet taken at the time of publication: the declaration of independence by the Parliament in Barcelona and the activation of Article 155 of the Spanish Constitution by the Senate in Madrid. "Then we will have finally arrived at hell," writes Martí – with riots in Barcelona's streets, but most of all irreparable damage to legality and legitimacy in Spain. In the meantime, both of those steps have been completed.

In **Kurdistan** there had also been a referendum on independence against the resistance of the Iraqi central government. [OMAR YOUSEF SHEHABI](#) cites reasons why the law seems to have been on the side of the independentists in this case.

Back to the **German Bundestag**: [ROMAN LEHNER](#) unravels the clew of how the FDP politician Hermann-Otto Solms actually came to chair the constituent session of the new Parliament as Interim Speaker. This had always been the job of the oldest member of parliament, but that would have been an AfD politician, so the last *Bundestag* changed its Rules of Procedure. But that *Bundestag* is dissolved and doesn't exist anymore. What then was then the basis for the official acts of Mr Solms? The resolution that Lehner finds for this "Solms trilemma" is quite surprising (in German).

Another constitutional problem of the newly constituted Bundestag arises from the protracted coalition negotiations: At the moment there is no coalition yet, the government's structure is still unclear, and thus also that of the *Bundestag* committees. As in the last legislative term, Parliament has installed a "general committee" which has no basis in the constitution. [SIMON GELZE](#) describes four legal problems raised by this and how to fix them (in German).

## Elsewhere

[JÜRGEN HABERMAS](#) throws the full weight of his authority into the balance for Emmanuel Macron's plan to rebuild Europe and a true thunderbolt of an appeal to the emerging CDU/CSU/FDP/Greens coalition in Germany to get out of the French President's way. "You rub your eyes: There's someone who wants to change the status quo? Someone has the frivolous courage to rebel against the Fellahin fatalism who those who indiscriminately bow down to the supposedly compelling systemic imperatives of a world economic order embodied in lofty international organizations?" Eat this, Christian Lindner. For that, I even break with my habit of linking exclusively to blog posts here.

[JULIAN KRÜPER](#) defends the refusal of the *Bundestag* majority to accept the AfD candidate Albrecht Glaser as Deputy Speaker, the first post of new blog about parliamentary law in **Germany** in these trying times. A warm welcome to this laudable endeavour by Heiko Sauer and colleagues! It's nice to see the format of the academic expert blog making headway in Germany as well (in German).

With regard to **Catalonia**, [JURE VIDMAR](#) recommends so seek the solution of the conflict in comparative constitutional rather than international law, while [MARKO MILANOVIC](#) takes the case as an opportunity to reflect on the general rules of international law about secession. [MIGUEL ÁNGEL PRESNO LINERA](#) gives an overview of the many constitutional problems encountered in the unprecedented application of the Article 155 of the

Spanish Constitution and a very helpful bibliography of posts and articles published so far on this complicated matter. [ARGELIA QUERALT](#) notes that, despite all the mistakes of the government in Madrid, it was the 70 out of 135 Catalan parliamentarians who broke the constitutional pact by unilaterally declaring independence.

[ELINE KINDT](#) draws our attention to the growing problems of the European Court of Human Rights in getting its judgments enforced. In the case of Ukraine, thousands are waiting in vain for their pension entitlements to be met, despite court judgments by all instances. The ECHR has now removed these cases from its list and handed them over to the Committee of Ministers – a highly controversial decision which gives procedural efficiency priority over the individual rights of claimants.

So much for this week. All the best, and take care,

Max Steinbeis

*A former version of this article the Committee of Ministers of the Council of Europe was erroneously referred to as "Council of Ministers".*

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